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NO. 91-737

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER - APPELLEE,

V.

RICKEY DEWAYNE PRINCE,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND TO THE ALABAMA COURT OF CRIMINAL APPEALS

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

*JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*ATTORNEY OF RECORD

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari and overrule the holding of the Alabama Court of Criminal Appeals which misapplied federal constitutional law by holding that a confession is due to be held inadmissible under the "totality of the circumstances" test if an officer makes misleading statements to a defendant regarding incriminating evidence against him even though the defendant denied committed the offense at the time of the interrogation and only confessed three (3) days later after failing a voluntary polygraph test which was taken under non-coercive circumstances and after Miranda warnings had again been given?

2. Whether this Court should grant certiorari and overrule the Alabama Court of Criminal Appeals which misapplied federal constitutional law by holding that an officer's statement that "capital murder

charge would not stay on you" was sufficient inducement to render the confession involuntary where the statement was an officer's opinion and not a promise of lenient treatment, where the confession was not given at the time of the interrogation but was given only after a three (3) day interval and only after the polygraph test had been failed?

3. Whether this Court should grant certiorari and overrule the Alabama Court of Criminal Appeals which misapplied federal constitutional law by holding that the defendant's limited intellectual functioning was a factor to be considered in determining whether a statement or confession is voluntary where there was no showing that the defendant was mentally retarded or otherwise unable to understand his actions in giving the statement or confession?

PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals reversing Respondent's conviction is not yet reported, but is reproduced as Appendix A to this petition.[1]

JURISDICTION

The judgment of the Supreme Court of Alabama which is sought to be reviewed was rendered on August 16, 1991. This Court has jurisdiction under 28 U.S.C. §1257(a), as amended (by Public Law 100-352) on June 27, 1988.

Although the Alabama state court, in rendering the opinion in the instant case, cited only state authorities, it is clear that the state authorities themselves relied upon the United States Supreme Court's interpretation of the Fifth Amendment. For

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[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

example, the State Court relied upon Ex Parte McCary, 528 So.2d 1133 (Ala. 1988) to hold that an "affirmative misrepresentation" to a defendant makes the later statement involuntary. Ex Parte McCary relied upon Spano v. United States, 360 U.S. 315, 79 S.Ct. 1202, 3 1.Ed.2d 1265 (1959). The state court also relied upon Ex Parte Hill, 557 So.2d 838 (Ala. 1989), which in turn relied upon Spano, supra as well as Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). Under these circumstances, the United States Supreme Court has jurisdiction to consider the questions presented in this petition even though the State Court's opinion only relies upon State court authorities.

In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the court held that "[where] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any

possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so." 77 L.Ed.2d at 1214. The court also stated that it would not undertake review only if the state court decision clearly and expressly indicates that it is based upon "bona fide separate, adequate and independent [state]
grounds". Id at 1214. This holding of Michigan v. Long was recently re-affirmed in Coleman v. Thompson, 111 S.Ct. 2546 (1991).

There is no question that the State Court was applying federal constitutional standards when it decided the appeal in the instant case. Since the state court wrongly decided a substantial federal issue, this Court should accept jurisdiction to correct the state court's ruling.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V (in pertinent part)

...; nor shall [any person] be compelled in any criminal case to be a witness against himself....

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

The defendant was indicted by the Grand Jury of Morgan County, Alabama for the crime of capital murder in violation of §13A-5-40, Code of Alabama (1975) as amended. Trial of his case began on December 27, 1989, and afterwards, a verdict of guilty was returned. The defendant was sentenced to life without parole upon the recommendation of the jury.

On February 1, 1991, the Alabama Court of Criminal Appeals, in a written opinion, reversed the conviction on the ground that the defendant's confession had been involuntarily given to the investigating officers because

the officers had given the defendant misleading information prior to the confession. That court denied the State's Application for Rehearing on May 31, 1991.

A Petition for Writ of Certiorari to the Alabama Supreme Court was filed on June 14, 1991, and the Writ was denied on August 16, 1991 and the State's Motion to Stay Judgement was denied on September 20, 1991.

B. STATEMENT OF THE FACTS

The defendant, Rickey Dewayne Prince, was charged with the capital offense of committing intentional murder during a 1984 robbery or attempted robbery at a Wahavo Service Station in Lacey Springs, Alabama. In February of 1988, Gerald Goodwin of the Morgan County Sheriff's Office re-opened an investigation into the shooting death because he had received some information that caused him to focus on the defendant [S.R. 45-46]. He picked up the defendant, who was already on

probation, advised defendant of his constitutional rights and had him to sign a waiver of his rights [S.R. 48, 49]. The defendant was interviewed by his Probation Officer and then by Officer Goodwin [S.R. 52]. Goodwin taped his interview [S.R. 52]. During the interview, the defendant, at first, denied being at the scene of the crime [S.R. 54]. Later during the interview, Officer Goodwin told the defendant that he had two eyewitnesses that saw him commit the crime [S.R. 85, 86]. The officer admitted during the suppression hearing that he did not have any eyewitness to the crime at that time [S.R. 86]. The officer also told the defendant that they had found the victim's billfold in a ditch and that the billfold had fingerprints on it [S.R. 87]. At that time of the interview, the billfold had not been sent to the lab and a later examination did not reveal any prints [S.R. 87]. The officer also told the defendant that "capital murder wouldn't stay on you" [S.R. 87, 88] and that

he would not charge him with capital murder [S.R. 87, 88]. Goodwin also told the defendant that this is "the only way you can be helped" [S.R. 90]. The officer later told the defendant that he could be charged with anything from manslaughter to capital murder and that the charge would depend upon the depth of his involvement [S.R. 84]. The defendant then stated that two other persons used his [defendant's] gun to kill the deceased [S.R. 52]. The defendant admitted his involvement, but denied committing the crime [S.R. 54]. The defendant gave several different versions, the final of which was taped [S.R. 54, 55]. The defendant was not kept in custody and he was allowed to leave the courthouse [S.R. 61, 62, 65]. The defendant asked to take a polygraph test because he had taken one before and passed it [S.R. 65]. A test was set up for him [S.R. 65].

Three days later, the defendant arrived at the Hartselle Police Department and took the test after being advised of his Miranda rights [S.R. 66, 106]. The defendant was then informed of the results of the test [S.R. 70]. The defendant continued to deny committing the crime but the officers indicated to him that they knew it was not the defendant, but the dope inside him that shot the victim [S.R. 112]. The defendant started crying and signed a statement admitted that he shot the victim [S.R. 70, 114].

The defendant called Roger Rinn, a private psychologist who testified that he had examined the defendant [SR-141-143]. Rinn interviewed the defendant while the defendant was still in jail, obtained a history, and interviewed his parents [SR-143, 144]. He found that the defendant had a history of academic underachievement, that he was marginal, that he in the past had been addicted to cocaine and alcohol, and had

problems with people [SR-145]. The defendant told him that he, along with Wayne and Gary Davidson, were shooting cocaine that night and that he drove Gary Davidson to Huntsville on his motorcycle where Davidson shot the attendant while they were getting gasoline [SR-145, 146]. The defendant told Rinn that he told his wife that Davidson had shot the attendant [SR-146]. The defendant also stated that he felt the polygraph came out good and that he was told that he failed the test [SR-146, 147]. The defendant stated that he was physically abused after the taking of the polygraph but later changed that story [SR-147]. The defendant stated that he was told that if he signed the statement, he would get out on bond, and that he was told that he was not charged with capital murder [SR-147]. The defendant denied the shooting, stating that he was frightened and that he signed the statement because he wanted to get out of jail [SR-147, 148]. Rinn testified that the

defendant had a verbal I.Q. of 74, a performance I.Q. of 89 and a full scale I.Q. of 78. This placed him in the range of borderline intelligence, not retardation [SR-150]. This placed him in the tenth percentile of the national population in verbal skills and 12th percentile in full scale I.Q. [SR-150, 151]. The psychologist concluded that it would have been difficult for the defendant to understand written documents [SR-158].

REASON FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF A CONFESSION SHOULD BE DEEMED INVOLUNTARY UNDER CIRCUMSTANCES WHERE AN OFFICER MAKES A STATEMENT TO A DEFENDANT MISCHARACTERIZING THE EVIDENCE AGAINST HIM BUT THE DEFENDANT DENIES COMMITTING THE OFFENSE AND CONFESSES ONLY AFTER BEING TOLD OF A FAILED POLYGRAPH TEST WHICH WAS TAKEN THREE DAYS AFTER THE MISLEADING STATEMENTS WERE MADE TO HIM.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court held that before the State could introduce a confession by a defendant who is not represented by counsel, the Fifth Amendment required a showing that the defendant was advised of his constitutional rights and the he knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

In Illinois v. Perkins, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), the Court stated that "Miranda forbids coercion, not mere strategic

deception", and the Court stated that "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns". S.Ct. at 2397.

In Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the Court left unanswered the question of whether an officer's false statement about having found the defendant's fingerprints at the scene would be relevant to finding the confession to be invalid under Miranda where the confession was otherwise given under non-coercive circumstances and preceded by the required Miranda warnings.

In Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), the Court held that where the questioning was of short duration and the defendant was a mature individual of normal intelligence, the fact that a police officer misrepresented statements that a co-defendant had made is insufficient to make an otherwise voluntary

confession inadmissible. It must be acknowledged, however, that Frazier v. Cupp involved a conviction obtained prior to this Court's decision in Miranda, and thus the Court did not have occasion to determine if that confession would have withstood the application of Miranda.

In the instant case, the officer told the defendant that he had an eyewitness to the crime, namely one of the co-defendants and also told the defendant that he had fingerprints on the billfold, although the officer later admitted that he had not taken a statement from the co-defendant nor had they found any of the defendant's fingerprints on the billfold. Thus, this Court should grant certiorari to answer the question that was left unanswered in Oregon v. Mathiason and to determine if the rule of Frazier v. Cupp should be extended to post Miranda cases.

Furthermore, the misleading statements would not have rendered this confession involuntary because subsequent intervening

circumstances broke the "casual connection" between the statements and the confession so that the confession would have been "sufficiently an act of free will to purge the primary taint". Taylor v. Alabama, 457 U.S. 487, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). There was a three day interval between the officer's statements and the confession, the defendant voluntarily returned to the police station to take a polygraph test and confessed only after learning that he had failed the test, the Miranda warnings had been administered prior to taking the test, and the State established that the circumstances surrounding the confession were not coercive.

In the instant case, the Alabama Court of Criminal Appeals held that the "affirmative misrepresentation" caused the defendant to give statements connecting him to the offense and to later confess to the crime.

Additionally, that court held that the three day interval was an insufficient intervening period to negate the effects of the officer's actions. The Alabama Court of Criminal Appeals' opinion clearly conflicts with precedents of this Court concerning whether the giving of false or incomplete information is sufficient to invalidate a confession, e.g., Frazier v. Cupp, and with decisions of various federal courts which holds that a break in custody is relevant to determining if a subsequent confession is voluntary. e.g. United States v. Patino, 862 F.2d 128 (7th Cir. 1988), cert. denied, 109 S.Ct. 2072; Dunkin v. Thigpen, 854 F.2d 394 (11th Cir. 1988); United States v. Lewis, 833 F.2d 1380 (9th Cir. 1987); McFadden v. Garraghty, 820 F.2d 654 (4th Cir. 1987), citing Oregon v. Elstad, 470 U.S. 298 (1985); Agee v. White, 809 F.2d 1487 (11th Cir. 1987).

In Agee, supra, where the statement was given after an illegal arrest, the court held that where an initial statement which did not

admit any criminal activity and which did not increase the pressure to give the second incriminating statement, the second statement would not be held involuntary. The Court also noted that six days was sufficient to dissipate any coercive impact from the alleged illegal arrest.

The Alabama Court of Criminal Appeals' decision also conflicts with this Court's decision in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) where the court held that the confession was not tainted and was admissible where the defendant had been released from custody on his own recognizance and voluntarily returned several days later to make his statement. Wong Sun should govern the facts of the instant case where the defendant voluntarily returned to take the polygraph test and then confessed upon being informed that he had failed it.

Because the Alabama courts has decided that this Court's precedents hold involuntary any confession obtained when the police uses

some forms of factual misrepresentation in order to obtain the confession and hold that a three day interval is insufficient to eradicate any effect of the misrepresentation, this Court should grant certiorari to decide whether said factual misrepresentations would void a confession where the misrepresentations were not made under coercive circumstances, where the defendant continued to deny committing the offense after the said misrepresentations were made, where the confession was given three days later after failing a polygraph test, and where the Miranda warnings had again been administered to the defendant prior to taking the test.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE FOLLOWING QUESTIONS CONCERNING INDUCEMENTS THAT ARE SUFFICIENT TO INVALIDATE A CONFESSION:

(A)

WHETHER AN OFFICER'S STATEMENT THAT "CAPITAL MURDER WON'T STAY ON YOU" IS TO BE CONSIDERED A SUFFICIENT INDUCEMENT TO INVALIDATE A CONFESSION WHERE THAT STATEMENT WAS MERELY AN OFFICER'S OPINION OF THE CHARGES THE DEFENDANT WILL FACE AND WHERE THE STATEMENT WAS NOT A PROMISE OF LENIENCY?

(B)

IF IT IS TO BE CONSIDERED AN INDUCEMENT TO CONFESS RATHER THAN AN OPINION, CAN THE OFFICER "CURE" THAT STATEMENT BY LATER TELLING THE DEFENDANT, IN THAT SAME INTERROGATION, THAT THE CHARGE COULD BE ANYTHING FROM CAPITAL MURDER TO MANSLAUGHTER?

(C)

EVEN IF THE OFFICER'S STATEMENT IS CONSTRUED TO BE AN INDUCEMENT, DID THE STATEMENT INVALIDATE THE CONFESSION WHERE THE DEFENDANT CONTINUALLY DENIED COMMITTING THE CRIME AND DID NOT CONFESS DURING THAT INTERROGATION?

(D)

IF THE STATEMENT IS CONSIDERED TO BE AN INDUCEMENT, WAS A THREE DAY INTERVAL BETWEEN THE OFFICER'S STATEMENT AND THE CONFESSION A SUFFICIENT AMOUNT OF TIME TO REMOVE ANY NEXUS BETWEEN THE STATEMENT AND THE CONFESSION ESPECIALLY SINCE THE CONFESSION WAS ONLY MADE AFTER THE DEFENDANT HAD FAILED A VOLUNTARY POLYGRAPH TEST WHICH HAD BEEN PRECEDED BY THE MIRANDA WARNINGS?

This Court has repeatedly affirmed that a confession, in order to be valid, must be obtained without the use of direct or indirect promises. Brahms v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed.2d 568 (1897). Lower federal courts have consistently held that statements by officers that "you have nothing to worry about" or statements that "the prosecutor and the judge would be notified of the cooperation" do not contain implied promises of immunity or leniency. e.g. Agee v. White, 809 F.2d 1487 (11th Cir. 1987); United States v. Fraction, 795 F.2d 12 (3rd Cir. 1986), respectively. Implicit in the Alabama Court of Criminal Appeals' holding is that "capital murder won't stay you you" is

an implied promise of immunity and this holding conflicts with the holdings of those federal courts. The officer's statement was merely an expression of his opinion that the defendant would not be convicted of capital murder and does not constitute a promise, which is defined by Fraction, supra, as an "offer to perform or withhold some future action within the control of the promisor" and "a promise is not the same thing as a prediction about future events beyond the parties control", Id at 15. That the defendant would not be charged with a capital offense was a prediction, not a promise, because the officer did not have the ultimate authority to decide what charge the defendant would face and the officer so informed the defendant. Although, in other cases, the Alabama Courts have noted the difference between an expressed opinion by an officer and a promise, see Ex Parte Singleton, 465 So.2d 443 (Ala. 1985), the court ironically refused to recognize that difference in this case, and

the failure to do so implicates the Fifth Amendment since the state court was obviously applying federal constitutional law to void the defendant's confession.

Furthermore, even if the officer's statement was seen as a promise, this would not automatically invalidate the confession under Brahams. The Brahms test has not been interpreted as a per se proscriptions against all promises during interrogation, Hawkins v. Lynaugh, 844 F.2d 1132 (5th Cir. 1988), but only against those that "overbear a defendant's will." Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976).

This Court should also decide on certiorari if an officer, who gives misleading statements about the charge a defendant would face, can "cure" that misstatement by correcting himself in that same interrogation. The officer in this case later told the defendant that the charge could be anything from "capital murder to manslaughter", clearly disspelling any notion the defendant may have

had that he would not face capital charges if he confessed.

Moreover, defendant did not confess at the interrogation when the statement was made by the officer and thus there is no basis for the Alabama Court of Criminal Appeals to conclude that the statement affected the decision to confess in any way. As suggested in Agee v. White, 809 F.2d at 1494, a repeated denial is a significant factor in determining whether the defendant perceived the statement as an implied promise of leniency. Moreover, the Agee court concluded that the more likely implication of such a statement is that the defendant would not be prosecuted if his version of the facts are true. The Alabama Court of Criminal Appeals apparently did not accord sufficient weight to the continued denials of the defendant, even in light of the officer's statement, when it made a determination on the voluntariness of the statement.

The three day interval between the officer's statement and the confession was sufficient time to remove any possible nexus between the officer's statement and the confession. In regards to this argument, Respondent adopts that portion of Argument I which contains a similar argument regarding the three day interval between the time defendant was given the mischaracterized evidence and the entry of the confession.

III.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AN APPELLATE COURT MAY CONSIDER A DEFENDANT'S LIMITED INTELLECTUAL FUNCTIONING AS A FACTOR IN DETERMINING WHETHER A STATEMENT OF CONFESSION IS INVOLUNTARY WHERE THERE IS NO EVIDENCE THAT THE DEFENDANT IS RETARDED OR OTHERWISE UNABLE TO UNDERSTAND HIS ACTIONS AND WHERE THERE WAS NO COERCIVE POLICE ACTIVITY USED TO OBTAIN THE STATEMENT OR CONFESSION.

The Alabama Court of Criminal Appeals found that under the "totality of the circumstances" the defendant's statements were involuntary. After noting that the officer

had made false statements to the defendant concerning the evidence against him and that the officer had told the defendant that "capital murder would not stay on him", the court held that the statements were involuntary because of the testimony that the defendant possessed limited intellectual functioning. The testimony indicated that the defendant had an I.Q. of 74, a Performance I.Q. of 89 and a Full Scale I.Q. of 78. The defendant was not considered mentally retarded by the medical expert called on the defendant's behalf.

The Alabama Court of Criminal Appeals holding that these statements were involuntary because of the limited intellectual functioning conflicts violently with Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), which held that a deficient mental state would not automatically invalidate a defendant's statement and that there must be evidence of "coercive police activity". Id at L.Ed.2d 484. There was no evidence of coercive policy activity in the interrogation

of the defendant, nor evidence of any other form of improper police conduct.

The Alabama Court of Criminal Appeals' holding also conflicts with the holding of various federal courts, especially the Eleventh Circuit Court of Appeals, which has held that an I.Q. level of 62 was not sufficient by itself to invalidate a confession in absence of improper police conduct. See Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988). The defendant's I.q. of 74 surely would have been held sufficient for him to give a voluntary statement under federal law.

CONCLUSION

This Court should grant certiorari and consider adopting the rule that, where an inducement to confess is given during the interview and the defendant does not confess and still vigoriously denies having committed the crime, the effect of the inducement or coercion is simply dissolved if there is a

break in custody and the defendant is allowed to leave. Some circuit courts have adopted a similar rule regarding claims under Edwards v. Arizona, 451 U.S. 447, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1984). For example, the Eleventh Circuit in Dunkin v. Thigpen, 854 F.2d 394 (1988) held that where a defendant makes a request for counsel, and is then released from custody, the police may subsequently initiate interrogations and obtain a valid confession from the defendant because the defendant would have had an adequate opportunity to obtain or contact his attorney. Id. at 397. In the instant case, since the defendant left the initial interview without confessing to the crime, any effect of the inducement or coercion should have dissipated during the three day break between interviews and the defendant's confession upon his voluntary return to take the polygraph test represented

a voluntary statement which was not induced by any coercion or promise of lenient treatment.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I, James B. Prude, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this _____ day of October, 1991, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent, by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable John Mark McDaniel
Honorable William P. Burgess, Jr.
313 Franklin Street
Huntsville, Alabama 35801

I further certify I have served all parties required to be served.

_____

JAMES B. PRUDE
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:
Office of the Attorney General
Criminal Appeals Division
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

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